

4 Official Opinions of the Open Meetings Compliance Board 63 (2004)

OPEN SESSION REQUIREMENT – PUBLIC BODY VIOLATES ACT BY CONDUCTING DISCUSSION DURING ANNOUNCED RECESS

June 22, 2004

*Mr. Jim Kennedy
Editorial Page Editor
The Aegis*

The Open Meetings Compliance Board has considered your complaint that the Aberdeen City Council violated the Open Meetings Act by conducting what amounted to a closed session during a recess in an open meeting on March 8, 2004. For the reasons stated below, the Compliance Board concludes that the Act was violated.

I

Complaint and Response

The complaint recited the following sequence of events: On March 8, 2004, the Aberdeen City Council held an open meeting to consider controversial amendments to the City's zoning ordinance and related map. The audience at the meeting included a number of people who would be directly affected by the City Council's decision. After a hearing in open session, and before acting on the legislative matter, the presiding officer, Mayor Doug Wilson, informed the audience that the City Council would be taking a ten-minute recess. According to the complaint, "as citizens milled about the chambers, the council members huddled in a tight circle behind their dais flipping through pages of notes, tracing lines on maps and obviously deliberating in secret on the impending [zoning] vote. In hushed voices, using sheets of papers to cover their mouths and muffle their speech, the council members spent ten minutes in discussion even calling over City Attorney Greg Rapisarda and City Manager Peter Dacey to join them." After the recess, the City Council approved the amendments, "though the nature of their discussions on the matter during the recess were never made public." The complaint contended that the discussion during the recess violated the Open Meetings Act.

In a timely response on behalf of the City Council, Mr. Rapisarda denied that the Act had been violated. The response noted that the ten-minute recess was "scheduled as part of the agenda and was not called for out of order or for the

specific purpose of discussing the ordinance or any other issue.” During the recess, “two of the members of the Council, Michael Hiob and Gina Bantum, who sit next to each other, began a conversation as to whether the points made at the public hearing [preceding the recess] were viable. During the public hearing owners of property, which was the subject of the rezoning, questioned the Council regarding a height requirement within 800 feet of the Maryland Route 22.” At this point, the City Attorney joined the conversation with the two Council members. The response continued as follows:

One of the Council members asked whether the 800 feet extended beyond a particular property line. The Mayor then turned his chair to hear what I had to say. Councilmember Ron Kupferman stood up and asked me to clarify the Council’s right to modify the ordinance. No one was excluded from this discussion, which was in full view of the attendees. The Council did not retreat to another room nor was there any intent to have a meeting. There was no attempt to muffle our voices. One Council member may have spoken and used a pad of paper but that was not done by all.

The response argued that the Open Meetings Act does not “prohibit a brief encounter among Council members and does not prevent Council members from seeking clarification of one of the points which was made at the public hearing. In essence, the discussion referred to in the complaint is not a meeting within the purview of the law and was not a closed session.”

II

Analysis

The core command of the Open Meetings Act is that, unless the Act otherwise allows for a closed meeting, “a public body shall meet in open session.” §10-505.¹ A meeting occurs when a quorum is present and the circumstances allow for interaction among the quorum about a matter of public business. §10-502(g). *See, e.g., 3 Official Opinions of the Maryland Open Meetings Compliance Board* 78, 81 (2001) (Opinion 01-2).

The test of whether a meeting is really “open” is a practical one: “The Open Meetings Act is violated if a session is open in name but not in reality.” *3 Official Opinions of the Maryland Open Meetings Compliance Board* 115, 116 (2001)

¹ All statutory references in this opinion are to the State Government Article, Maryland Code.

(Opinion 01-8). In two opinions, we held that the Act was violated when the presiding officer indicated to the audience that the meeting was over, but then discussion continued among a quorum of the public body. The discussion following the announcement, we held, was not an “open session” even if the doors remained open. 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 178 (1996) (Opinion 96-9); 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 162 (1996) (Opinion 96-4).

Similarly, a presiding officer’s announcement that a meeting will be in recess for a stated period of time would cause members of the public to believe that no discussion of public business by a quorum of the public body would occur during the recess. Some members of the audience undoubtedly leave the meeting room during a recess to attend to personal matters. If a meeting in fact occurs during an announced recess, the meeting is not “open” to all members of the public who wish to observe it, even if those who happen to remain in the room can do so.

In this situation, the discussion at the start of the recess was not a meeting, because it involved only two members of the Council, one short of a quorum. The City Attorney is not a member of the Council, so his joining the discussion did not create a problem. However, when the Mayor turned his chair to listen, and consequently had an opportunity to participate, and when another Council member posed a question to the City Attorney about the matter under discussion, a meeting subject to the Act began.

Given that the announced recess diminished the opportunity for members of the public to observe that discussion, the meeting was not fully “open.” Once the discussion expanded to include a quorum, the discussion should have ceased until the ten-minute recess was over. What we wrote in an earlier opinion applies here:

We accept that none of the participants thought that a meeting subject to the Act was taking place. What happened here was a failure of awareness, not a deliberate attempt to cut legal corners. Nevertheless, members of a public body have a duty to be especially sensitive to Open Meetings Act issues when, as here, a quorum is together ... and the topic bears directly on a pending matter.

3 *Official Opinions of the Maryland Open Meetings Compliance Board* 30, 35 (2000) (Opinion 00-8).

III

Conclusion

In summary, the Open Meetings Compliance Board finds that the Aberdeen City Council violated the Open Meetings Act on March 8, 2004, by the conduct of a meeting that, occurring in the midst of an announced recess, failed to be in “open session” as required by the Act.²

OPEN MEETINGS COMPLIANCE BOARD

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² To the extent that the discussion involved advice from the City Attorney, perhaps the meeting could have been closed under §10-508(a)(7). However, the procedures required by the Act to close a meeting for this reason were not followed.